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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

**STATE OF ARKANSAS, et al.,**  
*Petitioners,*  
v.

**STATE OF OKLAHOMA, et al.,**  
*Respondents.*

**ENVIRONMENTAL PROTECTION AGENCY,**  
*Petitioner,*  
v.

**STATE OF OKLAHOMA, et al.,**  
*Respondents.*

**On Writs of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit**

**AMICI BRIEF OF THE  
U.S. SENATOR FROM OKLAHOMA, DON NICKLES  
JOINED BY THE U.S. SENATOR FROM OKLAHOMA,  
DAVID BOREN IN SUPPORT OF RESPONDENTS**

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No. 90-1262

STATE OF ARKANSAS, *et al.*,  
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v. *Respondents.*

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No. 90-1266

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v. *Petitioner,*

STATE OF OKLAHOMA, *et al.*,  
v. *Respondents.*

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***AMICI BRIEF OF THE  
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DAVID BOREN IN SUPPORT OF RESPONDENTS***

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The Senators from Oklahoma, representing the people of Oklahoma, submit this brief as *amici curiae* in support of the respondents and urge this Court to uphold the decision by the U.S. Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990).<sup>1</sup>

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<sup>1</sup> The consent of counsel for each of the parties has been obtained and a letter from each counsel indicating his consent to the filing of this brief has been filed with the Clerk.

**INTEREST OF THE AMICI CURIAE**

The Senators from Oklahoma have a compelling interest in this case. It is crucial that the Tenth Circuit's decision be upheld to ensure that Oklahoma's Illinois River remains one of the most beautiful rivers in the entire country, and to ensure that the national interest in eliminating water pollution be protected. Any abrogation of this decision would deny Oklahoma and other states the right to establish and enforce water quality standards as the Clean Water Act, 33 U.S.C. § 1251-1387, intended.

As Members of Congress, the Amici Senators have a special interest in the interpretation of the Clean Water Act. Being part of the legislative process gives the Senators an enhanced view of statutory construction and legislative intent. This unique perspective allows them to state authoritatively what Congress intended when creating the Clean Water Act. A proper interpretation of the Clean Water Act will protect not only Oklahoma's Illinois River, but will protect other states from ending up as a dumping ground for out-of-state pollutants. Water quality is a crucial issue, and the plain meaning of water quality standards must be upheld.

In 1972, the Clean Water Act created a scheme for approval or disapproval of discharges into interstate waters. The focal point of this scheme is the National Pollution Discharge Elimination System (NPDES) permit program, which utilizes State Water Quality Standards such as Oklahoma's. State Water Quality Standards are intended to accompany EPA's technology-based standards, so as to prevent harmful cumulative effects from discharges. "Water Quality Standards are retained as a supplementary basis for effluent limitations \* \* \* so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 n.12 (1976).

While the Clean Water Act establishes minimum requirements for water pollution control, Congress enacted Section 510 to preserve a state's right to establish water quality standards that are more stringent than the federal minimum requirements. 33 U.S.C. § 1370. These Senators are interested in ensuring that Oklahoma's rights to establish and enforce water quality standards are protected. One of the fundamental policies of the Clean Water Act involves protecting the primary responsibilities and rights of the states to control and eliminate water pollution and "to plan the development and use \* \* \* of land and water resources." Section 101. Unless Oklahoma and other states are protected now, they will be forced to accept the lowest common denominator of upstream States' water quality standards.

In the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that violated Arkansas' water quality standards. At that time the plant discharged all its waste into the White River, which is not an Illinois River tributary. In order to stop violating its own water quality standards, Arkansas built a new treatment plant. This plant reduced discharge pollutants, but half of the treated effluent was then put into an Illinois River tributary, violating Oklahoma's water quality standards.

Oklahoma Water Quality Standards (OWQS) provide special protection for the Upper Illinois River by designating it an Oklahoma Scenic River. This designation preserves the river through "beneficial use limitations." This federally-approved standard plainly prohibits any "new point source discharge of wastes" which would result in "water quality degradation." OWQS §§ 5, 3. The Tenth Circuit has applied the plain meaning of Oklahoma's standard. It is clear from the face of the standard that no degradation is allowed.

In enacting the Clean Water Act, Congress entrusted to EPA the important task of analyzing the issues in-

volved in granting NPDES permits. In order to issue a permit authorizing discharges into an interstate waterway, EPA must determine that the permit will meet the Clean Water Act's requirements, including compliance with federally approved water quality standards of the downstream state. Well-established rules of administrative interpretation require the EPA to carry out this function in a reasonable manner. In this case, the EPA has unreasonably avoided the plain meaning of Oklahoma's standards which require no water quality degradation.

These Senators again urge the Court to uphold the Tenth Circuit's decision, and thereby assure affected states of their right to enforce federally approved water quality standards as intended by Congress. Oklahoma's standards cannot and should not be compromised. The Court is urged to rule in favor of Oklahoma to prevent further degradation of the beautiful and scenic Illinois River.

#### **SUMMARY OF THE ARGUMENT**

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream state as well as the standards of the State where a discharge occurs. The Tenth Circuit also reversed EPA's final decision to issue the permit, labeling it a misinterpretation and misapplication of two important Oklahoma water quality regulations and an arbitrary disregard for certain expert testimony. In addition, the Court found that EPA's interpretation of Oklahoma's water quality regulations were contrary to EPA's historical interpretation of the Clean Water Act. The Court held that on its face, the language of Oklahoma's Water Quality Standards is clear and that EPA's decision to issue the permit contravened the plain meaning of the OWQS as well as the requirements of the Clean Water Act.

The Court of Appeals' decision raises two issues: whether Oklahoma's Water Quality Standards apply to a permit for an Arkansas facility, and whether the Court of Appeals properly interpreted the OWQS and applied them to the facts of this case. EPA agrees with Oklahoma and the Tenth Circuit that the federally approved water quality standards of an affected downstream state must be applied to a permit issued to an upstream facility. Therefore, this particular holding of the Court of Appeals is only disputed by Arkansas. On the other hand, the finding that EPA misinterpreted Oklahoma's federally approved water quality standards is disputed by both Arkansas and EPA.

With the enactment of the Clean Water Act, Congress supplanted state and federal common law with federal legislation. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (Milwaukee II). Thus, federal law, as embodied in the Clean Water Act, governs the complex issues raised in interstate water pollution disputes. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (Milwaukee I); *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Under this Act, before a permit authorizing discharges into interstate waterways may issue, EPA must determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, including compliance with federally approved water quality standards of an affected state. In determining whether or not a proposed permit is in compliance with federally approved water quality standards of an affected state, EPA must look at the plain language of the state statute. If it is clear on its face, EPA must apply that standard without resort to interpretation. *United States v. Oregon*, 336 U.S. 646, 648 (1961).

In this case, EPA correctly concluded that the permit must comply with OWQS, but incorrectly interpreted the plain meaning of the federally approved state standards.

As a result, the Court of Appeals was well within its authority when it reversed EPA's decision to issue the permit and found that EPA had misinterpreted and misapplied Oklahoma's water quality standards.

## ARGUMENT

### **I. THE PROVISIONS OF THE CLEAN WATER ACT CLEARLY REQUIRE COMPLIANCE WITH THE FEDERALLY APPROVED WATER QUALITY STANDARDS OF AN AFFECTED STATE IN INTERSTATE WATER QUALITY DISPUTES.**

The Clean Water Act was adopted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. § 1251(a). The primary mechanism for achieving the goals of the Clean Water Act was the establishment of the NPDES permit program. Section 301(a), 33 U.S.C. § 1311(a). The Act provides for permits to be issued either by EPA or by a state which has been granted permitting authority. Section 402, 33 U.S.C. § 1342. Regardless of who issues the permit, the permit must contain effluent limitations established to ensure compliance with the Act's technology-based and water quality-based requirements. Effluent limitations control the type, quantity, rate, and concentration of effluent that can be discharged. § 502(11), 33 U.S.C. § 1362(11). Technology-based limitations are established based on the degree of effluent control which can be achieved by point sources using various levels of pollution control technology. §§ 301, 304, 33 U.S.C. §§ 1311, 1314. *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-36 (1977). Water quality-based limitations impose more stringent limitations in order to ensure that the particular designated uses of a waterbody will be protected and maintained.

In the Clean Water Act, Congress recognized that technology-based limitations alone were not sufficient to

protect water quality. Therefore, Congress enacted Section 301(b)(1)(C) of the Act, which further requires that all permits ensure compliance with "any more stringent limitation, including those necessary to meet water quality standards," developed by the states and approved by EPA pursuant to Section 303, 33 U.S.C. § 1313, and other state water related laws or regulations. Section 303 water quality standards consist of the designated use of the waterbody (*e.g.*, agriculture, drinking water supply, fish and wildlife management, recreation) and the water quality criteria established to attain and maintain such uses. See *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987). Unlike technology-based standards, water quality standards are not developed based on an evaluation of the capability of pollution control technologies available to dischargers, but rather on the physical attributes of a stream necessary to support the designated use. See generally § 303(c)(2), 33 U.S.C. § 1313(c)(2), and 40 C.F.R. 131.10(g). Thus, once water quality standards have been set under Section 303 of the Act, § 301(b)(1)(C) requires that permit limits be established to assure compliance with the standards without exception.

**A. The Plain Language Of The Clean Water Act Does  
Require That Affected States' Federally Approved  
Water Quality Standards Be Applied to Permits  
For Upstream State Facilities.**

The decision of the Court of Appeals gave the unambiguous language of the Clean Water Act its plain meaning. The Court held that:

" [based on its plain language \* \* \* we agree with EPA that the purpose of [§ 401(a)(2), 33 U.S.C. § 1341(a)(2), requiring 'compliance with applicable water quality standards'] must be to enable affected states to ensure that their water quality will not be jeopardized by a discharge in another state. Only a strained interpretation of the statute could produce the result Arkansas seeks—that 'applicable water

quality requirements' refers to the WQS of only the source state." *Oklahoma v. EPA*, 908 F.2d 595, 610 (10th Cir. 1990).

Arkansas argues that provisions of the Clean Water Act do not require compliance with the standards of downstream states. (Brief of Petitioners at page 13). Arkansas alleges that § 402(b)(5) is the controlling provision for resolving interstate water disputes whether the source state or EPA is the permitting authority. Here, however, EPA is the permit-issuing authority, so EPA is directly responsible for determining whether a proposed permit will meet all applicable requirements of the Act and implementing regulations (§ 402(a)).

Although Section 402(b)(5) is pertinent to resolving interstate water disputes when the source state is the permitting authority, Section 401(a)(2) is particularly relevant when EPA is the permitting authority. This section states:

(2) \* \* \* Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. \* \* \* Such agency \* \* \* shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit. (Emphasis added.)

This section *requires* a license or permit to contain any necessary conditions to ensure compliance with the applicable water quality standards of an affected state. It does not make compliance with affected states' water quality standards discretionary, it makes compliance mandatory. This requirement is emphasized in EPA regulations. 40 C.F.R. 122.44 forbids issuance of a permit unless appli-

cable water quality standards of "all affected states" are complied with by all upstream discharges. In addition, Section 505(h) of the Clean Water Act gives a State the right to sue to enforce effluent limitations on an out-of-state discharger which are necessary to prevent violations of its water quality standards. This section would not be needed if a permit may be issued which does not protect the affected state's water quality.

Arkansas relies on the "permissive" language contained in Section 402(b)(5) for the argument that the Clean Water Act requires permitting agencies to "consider the standards of downstream states, but does not require the automatic application of those standards." (Brief of Petitioners at page 13.) This section however, does not specifically address water quality standards of downstream states. Rather, it requires that a source state notify any *affected* state of the permit application and give such state the opportunity to submit written *recommendations* with respect to the permit application. Arkansas argues that neither this provision nor any other section of the Act, imposes an affirmative obligation on the state permitting agency to accept the downstream state's recommendations. (Brief of Petitioners at page 14).

Although a source state may not be required to accept an affected state's *recommendations*, Congress by statute clearly required the source state to certify that the permit would not violate any applicable water quality requirements including those of an affected state. § 401(a)(1) & (2). Thus, a source state may have the discretion not to accept the recommendations of an affected state, but it *must* ensure compliance with such state's federally approved water quality standards.

Any other reading of the statute would undermine the stated purpose and congressional intent of the Act to restore and maintain the Nation's waters and "to recognize, preserve, and protect the primary responsibilities and

rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources and to consult with the Administrator in the exercise of his authority under this Act." Section 101(a) & (b).

**B. Failure To Apply An Affected State's Federally Approved Water Quality Standards To A Permit On An Upstream Facility Would Allow An Upstream State To Discriminate Against An Affected Downstream State.**

If an affected state's federally approved water quality standards were deemed not to apply to a permit for an upstream facility, then an upstream state could seriously hinder the attainment of an affected state's water quality goals. This could also impact an affected state's industrial development choices. If an upstream state has more lenient water quality standards, then pollutants from discharges upstream will affect the water quality of the affected states interfering significantly with those states' achievement of their water quality goals which Congress expressly sought to "recognize, preserve and protect". Section 101(b).

Those who seek to overturn the Court of Appeals' decision in this case argue that imposition of affected states' federally approved water quality standards on an upstream state would allow downstream states to discriminate against upstream states by enacting unnecessarily stringent standards. This argument ignores the fact that the same argument can easily be made in the reverse. If upstream states are allowed to ignore the federally approved water quality standards of a downstream state, an upstream state could enact more lenient standards thereby enticing industry away from the downstream state by using the lure of fewer restrictions on discharges.

The failure to impose an affected state's more stringent standards on an upstream state is detrimental to the

goals and purposes of the Clean Water Act. The failure to apply an affected state's standards will allow for more pollutants to be discharged versus Congress' stated goal of the elimination of discharge of pollutants into navigable waters. Section 101(a)(1). This position also ignores the fact that EPA must approve a state's water quality standards. If EPA found that a state's standards were unduly discriminatory against upstream discharges, they could deny approval.

The instant case is a prime example of an upstream state discriminating against a downstream state. The facts in this case (See Brief for EPA at pages 6 & 7) disclose that in the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that discharged all of its wastewater into the White River (which is not a tributary of the Illinois River). The White River was unable to assimilate that waste without violating Arkansas' water quality standards. To alleviate this situation, Fayetteville constructed a new wastewater treatment plant, *with federal financial assistance provided by EPA* under the Clean Water Act. Thus, EPA has a vested interest in getting this plant into operation. The plant was designed so that discharges into the White River would not cause a violation of Arkansas water quality standards because half of the treated effluent was to be discharged into a tributary of the Illinois River.

EPA issued a NPDES permit for the Fayetteville treatment plant on November 5, 1985. The permit contained a reopen provision specifying that if an ongoing study of water quality in the Illinois River showed a need for more stringent limitations on Fayetteville's discharge to ensure compliance with Oklahoma water quality standards, the permit would be modified accordingly.<sup>2</sup>

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<sup>2</sup> The joint study, conducted by scientists from both Oklahoma and Arkansas, was commenced over four years ago using funding from EPA. Although the study has been completed, EPA will not release

Following various administrative appeals by both Oklahoma and Arkansas, EPA upheld its decision to issue a permit to the Fayetteville plant. The sewage plant has been in operation and discharging its effluents since the permit was finally approved by EPA in December 1988.

The facts show that Arkansas made the deliberate decision to divert discharge of its wastewater from an intrastate river into a tributary of the Illinois River 39 miles upstream from the Oklahoma boundary. Oklahoma has designated the Illinois River, from where the Illinois River enters Oklahoma from Arkansas until it reaches Lake Tenkiller Reservoir, as a "Scenic River" and has prohibited any degradation in this portion of the river and prohibited any new point source discharge of wastes. See, the 1982 Oklahoma Water Quality Standards, as adopted by the Oklahoma Water Resources Board and approved by EPA under Clean Water Act § 303(c). Thus, Oklahoma has made its intentions clear that this portion of the Illinois River constitutes an outstanding resource of exceptional recreational or ecological significance.

Furthermore, Oklahoma is not the only entity which acknowledges the unique beauty of the Illinois River. Congress has designated the upper Illinois as a potential addition to the National Wild and Scenic Rivers System. The Illinois River is listed as (40) in Section 1276 of Title 16 of the United States Code which enumerates rivers constituting potential additions to the national wild and scenic rivers system. Obviously, the Illinois River possesses the necessary physical qualities to gain federal and Oklahoma attention. When the Oklahoma legislature designated the Illinois River a scenic river, they found the river "possessed such natural scenic

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the findings because Arkansas has refused to sign off on the study. Arkansas will not sign off on the study's findings because of a dispute over whether data collected from Lake Tenkiller, which is fed by the Upper Illinois River, should be included. This data shows that the Lake is dead below the first four feet.

beauty and wildlife and recreational values that it would be preserved for the benefit of the people of Oklahoma."

These same attributes are valued by the congressional policy behind the federal National Wild and Scenic Rivers System. Congress intended this program for rivers which possess "remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values \* \* \*." 16 U.S.C. § 1271. These characteristics clearly describe the Illinois River, the only river in Oklahoma which Congress has recognized as possessing the qualities necessary to be added to the list of potential designees.<sup>3</sup>

Thus, in issuing the permit to the Fayetteville plant, EPA allowed Arkansas to totally disregard congressional intent and the protections Oklahoma has sought to place on this valuable resource. Arkansas took this action to protect its own waterway from further degradation, thus imposing its wastewater upon Oklahoma. To resolve its wastewater problems, Arkansas made the Illinois River the receiver of its waste. Such a result was never intended by Congress and, in fact, expressly prohibited in Sections 301(a) & (b), 401(a)(1) & (2), and 402(a).

## **II. THE COURT OF APPEALS CORRECTLY HELD THAT EPA HAD MISINTERPRETED AND MISAPPLIED OKLAHOMA'S WATER QUALITY STANDARDS.**

The Court of Appeals' unanimous opinion affirmed EPA's interpretation of the Clean Water Act as requiring application of the federally approved Water Quality Standards of any affected downstream state but went on to reverse EPA's final decision as flawed by misinterpretation and misapplication of Oklahoma's water quality regulations. The Tenth Circuit found the plain language of Oklahoma's regulations to be clear and EPA's decision to issue the permit arbitrary and capricious. *Oklahoma*

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<sup>3</sup> Final designation of the Illinois River as a federal Wild & Scenic River is pending before the Department of the Interior.

v. EPA, 908 F.2d 595, 616 (10th Cir. 1990). The Court should affirm the Court of Appeal's decision.

In its decision, the Court of Appeals rejected EPA's interpretation of the OWQS as protecting only against actual measurable injury to the River specifically traceable to the Fayetteville discharge:

"[W]e believe the plain language of the regulations manifests a clear intent to allow no degradation of the water quality of scenic rivers. More specifically, the regulations disallow any additional discharge of pollution (either a new point source or an increase from an existing source) to a scenic river if its water quality *has been degraded* or if the new source *would degrade* it." (*Id.* at 617, 618).

"\* \* \* We conclude the requirements of the Beneficial Use Limitations/Anti-Degradation Policy are violated when the water quality of a scenic river [such as the Upper Illinois] undergoes any human-caused, detectable change. By 'detectable change' we mean any detectable change in a water quality parameter such as turbidity or phosphorus \* \* \*. We do *not* mean a detectable change that violates a numeric criterion for that parameter \* \* \*, which criterion would otherwise apply if the Beneficial Use Limitations were not applicable (i.e., if the receiving waters were not designated as a scenic river or otherwise as '(a)' in [OWQS] Appendix A)." (*Id.* at 618).

The Court of Appeals also rejected the contention that an inability to detect the Fayetteville effluent's "individual impact on Illinois River water quality" would suffice to satisfy the OWQS, explaining that:

"If we were to accept this logic, once water quality standards in a stream were violated, additional new discharges might be permitted indefinitely so long as each one would have an unmeasurable individual impact. The absurdity of such a policy is manifest." (*Id.* at 632).

Therefore, the Court of Appeal's rejected EPA's interpretation of the OWQS which merely required that the incremental impact of a proposed additional discharge

must itself be detectable. The Court of Appeals held instead that a permit may not be issued to a source if a body of water is already experiencing water quality standard violations and a proposed new source would discharge the same pollutants to which those standards apply. Under this interpretation of the governing Oklahoma Standards, the Tenth Circuit found no reason for remanding to the permitting authority for any further proceedings.

**A. Oklahoma Water Quality Standards Clearly State That No Degradation Shall Be Allowed In High Quality Waters Such As The Illinois River.**

Once a State's Water Quality Standards have been approved by EPA under § 303, 33 U.S.C. § 1313, they have the force of federal law. Neither the state adopting those standards nor a permitting agency (whether it be a state agency or EPA) has authority to deviate from those standards or excuse noncompliance with them in issuing an NPDES permit. See *EPA v. California ex rel. State Water Resources Control Board*, *supra*, 426 U.S. at 220; *City of Sarasota v. EPA*, 813 F.2d 1106, 1109 n.10 (11th Cir. 1987).

The Oklahoma Standards applicable to this case were adopted and approved by EPA in 1982. The OWQS provide special protection for the Upper Illinois River by designating it as an Oklahoma Scenic River and as subject to special "beneficial use limitations." Thus, the Upper Illinois River is protected by a federally approved and enforceable standard categorically prohibiting any "new point source discharge of wastes" which would result in "water quality degradation." OWQS §§ 5, 3.

Section 1 of the 1982 OWQS provides that the purpose of the standards is to assure that degradation of existing quality of waters in the state does not occur. Section 3, the antidegradation policy, requires that "no degradation shall be allowed in high quality waters which constitute outstanding resource or in waters of exceptional recreation or ecological significance." High quality waters

include water bodies designated as "Scenic Rivers" in Appendix A of OWQS. Section 5 provides that any body of water designated as (a) in Appendix A (such as the Upper Illinois River) "are protected by prohibition of any new point source discharge of wastes or increased load from an existing point source. . . ."

The meaning of these sections are plain and unambiguous; no degradation of high quality waters is allowed. It does not state that degradation may occur as long as it is undetectable or unmeasurable in each individual application. The OWQS plainly and clearly require that not an iota of degradation may occur.

The Court of Appeals determined, based on the record, that it was undisputed that the water quality of the Upper Illinois River is already degraded under the criteria of the OWQS by excessive nutrients and turbidity. The court also found that the record showed, without contradiction, that substantial amounts of phosphorous, nitrogen and other organic pollutants put into the water by the Fayetteville plant would remain after the River entered Oklahoma.

Considering the unrefuted evidence contained in the record and noted by the Court of Appeals, that the discharge from the Fayetteville plant is contributing to further degradation of the Illinois River, neither EPA nor the State of Arkansas should be allowed to issue a permit for additional discharges into the Illinois River under the requirements of the Clean Water Act. EPA's attempt to weaken Oklahoma's Standards through a strained and inappropriate interpretation of Oklahoma's water quality requirements cannot and should not be allowed to stand.

**B. Even If Oklahoma's Water Quality Standards Were Not Clearly Unambiguous, EPA's Interpretation Was Plainly Erroneous.**

EPA argues that its interpretation of the Oklahoma Water Quality Standards should be accorded deference.

(Brief of EPA at page 20). In support of this proposition, EPA refers this Court to cases which hold that a reviewing court should defer to an agency's reasonable interpretation of a regulation it is charged with administering. However, EPA goes on to state that to the extent that the terms of a federally approved state standard are ambiguous or silent on a particular point at issue in an interstate dispute, EPA's interpretation of the standard should be followed "unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. at 872 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). As stated in the preceding section, Oklahoma's standards are neither ambiguous nor silent on the point at issue. The Oklahoma Standards are clear on their face. Therefore, there is no need for interpretation by EPA. *United States v. Bowen*, 100 U.S. 508, 513-514 (1879); *United States v. Oregon*, 336 U.S. 643 (1961).

Assuming, *arguendo*, that Oklahoma's Standards were not clear and thus were subject to interpretation, EPA's interpretation was erroneous. EPA tries to support its interpretation of Oklahoma's standards by stating that Oklahoma's standards are based on the EPA model water quality standards set out at 40 C.F.R. Pt. 131. Thus, EPA alleges that "it is surely reasonable and appropriate for EPA to construe the state standard as being consistent with the model provision." (Brief of EPA at page 20, note 25). Oklahoma's antidegradation provision (§ 3) provides:

*No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance.* (Emphasis added.)

The corresponding language in EPA's model anti-degradation regulations in effect until 1983 (40 C.F.R. 35.1550(e)(2) (1981)):

Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters \* \* \* of exceptional recreational or ecological significance.

Although the Oklahoma standard and EPA's model standard are very similar, EPA has subsequently modified this section of their model standards to allow for temporary degradation associated with construction projects. (Brief of EPA at page 23, note 27.) If EPA's previous interpretation of the original language had allowed for *any* degradation in high quality waters (such as the degradation that EPA's interpretation of the OWQS allows), then there would have been no need for EPA to modify this provision to allow for temporary degradation. Therefore, EPA had to modify its own standard to allow for *some* degradation, which strongly implies that its interpretation of the earlier language did not allow for *any* degradation. This supports Oklahoma's assertion that the correct interpretation of Oklahoma's Standards is that they do not allow for *any* degradation. To interpret Oklahoma's Standards to allow for some degradation is clearly erroneous.

### **CONCLUSION**

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the NPDES permit issued to Fayetteville municipal treatment plant modified to prohibit discharges of its effluent into the Illinois River basin.

Respectfully submitted,

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